

HOKULIA

SUB 7168 (Ph. I)
SUB 7168-A+B (Ph. II)

2008 SEP 29 PM 2 29

PLANNING DEPARTMENT
COUNTY OF HAWAII
September 24, 2008

Mr. Christopher J. Yuen
Planning Director
County of Hawaii
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720-4224

Re: Hokuli'a Development – Mamalahoa Highway Bypass
Ordinance Nos. 96-7 and 96-8
Development Agreement Dated April 20, 1998

Dear Mr. Yuen:

Thank you for your letter dated August 18, 2008 in which you expressed your concerns over 1250 Oceanside Partners' ("Oceanside") progress in constructing the remaining (southerly) portion of the Mamalahoa Highway Bypass (the "Bypass"). As I have shared with you in the past, Oceanside and the County have a common goal in getting the Bypass completed and Oceanside will continue to work with the County to resolve the problems that have prevented that goal from becoming a reality.

I have set forth in Exhibit "1" (enclosed) the facts that you requested as to the completion deadline for the Bypass and the action that Oceanside is undertaking to complete the remaining (southerly) portion of the Bypass. In summary, the facts are that:

- Oceanside is not obligated to construct the Bypass pursuant to Recital "L" and Section 1 of the Development Agreement if any challenge is brought against a permit or approval that is necessary for the construction of the Bypass.
- As such, the challenges brought by the Kelly plaintiffs in 2000 against Oceanside's permits and approvals suspended Oceanside's obligation to construct the Bypass until the parties settled the case in 2006.
- Similarly, the Coupe family's separate challenges in 2000 to Oceanside's permits and approvals and right to construct the Bypass on, over and through the Coupe family's land also suspended Oceanside's obligation to construct the Bypass.



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- Nonetheless and although Oceanside was not required to construct the Bypass until such challenges were finally resolved, Oceanside started construction because of the public importance of the Bypass and continued to construct the Bypass until the circuit court enjoined all construction activities in 2003.
- Notwithstanding the settlement of the Kelly case in 2006 and the disposition of Burial 21833 in 2007, as a result of the Coupe family's continued challenges against Oceanside's permits and approvals, Recital "L" continues to suspend Oceanside's obligation to construct the Bypass.
- Finally, the common law governing contracts also suspends Oceanside's obligation to restart construction of the Bypass until the Coupe family's appeal is finally resolved.
- With forty (40) months still left on the "clock," there is sufficient time for Oceanside to complete the remaining (southerly) portion of the Bypass.

But for the challenges raised by the Kelly plaintiffs and the Coupe family, Oceanside would have probably completed the Bypass by now. That being said, Oceanside nevertheless initiated discussions with County officials to find a solution that is fair to all parties and to the public. Oceanside is still willing to memorialize an understanding with the County for a revised construction schedule for the remaining (southerly) portion of the Bypass Highway. Thank you very much.

Sincerely,



John De Fries
Chief Executive Officer

Enclosure: Exhibit 1

EXHIBIT "1"

Enclosure Accompanying 1250 Oceanside Partners'
Response to Letter from Christopher J. Yuen
Dated August 18, 2008

STATEMENT OF FACTS RELATING TO THE BYPASS COMPLETION DATE

The following statement addresses the completion deadline for the Mamalahoa Highway Bypass (the "Bypass").

Project Zoning

1. When it rezoned 1250 Oceanside Partners' ("Oceanside") land for the Hoku'i'a project in 1996, the County Council did not insert a completion date for the Bypass in Ordinances 96-7 and 96-8.
2. At the time, neither Oceanside nor the County had sufficient information upon which a completion date could be reasonably estimated or established.
3. Oceanside had to first design the Bypass right-of-way corridor, which the County had to also approve, and then attempt to acquire that land from numerous property owners.
4. On April 20, 1998, Oceanside entered into a Development Agreement with the County that, in part, established a procedure for Oceanside to follow in its attempt to acquire the land that was needed for the Bypass right-of-way corridor.
5. This procedure explained how Oceanside was to purchase the land that was needed for the Bypass right-of-way corridor.
6. Under the Development Agreement, Oceanside and the County also agreed that the recitals set forth in the Development Agreement, including Recital "L," are a part of the Development Agreement and constitute terms and

standards against which the parties' respective rights and obligations shall be determined ("Recital L").¹

7. Recital "L" states that Oceanside "shall not be obligated to ... perform the terms and conditions of this Development Agreement" if "challenges" are brought against Oceanside's "zoning approvals and permits" and such challenges remain "pending resolution before a court."²

8. Recital "L" reflects the parties' intent that Oceanside cannot be compelled to perform an obligation under the Development Agreement if a third-party brings a challenge against a project-related approval or permit.³

9. The approvals and permits referred to in Recital "L" include all consents, approvals or permits that are contemplated by Ordinances 96-7 and 96-8.

10. Based upon the County's assurances set forth in the Development Agreement, Oceanside agreed to start constructing the Bypass and to complete construction within five years after commencement.⁴

Challenges Brought by the Kelly Plaintiffs

11. In 2000, the Kelly plaintiffs filed a complaint in the circuit court, challenging some of Oceanside's permits and approvals and then later amended their complaint to include additional and broader challenges to Ordinances 96-7

¹ Section 1 of the Development Agreement states, "The recitals hereinabove are incorporated herein by this reference and made a part of this Agreement as though set forth in full herein."

² "OCEANSIDE shall not be obligated to adhere to and perform the terms and conditions of this Development Agreement ("Agreement") until it has commenced construction of the Project and provided that any zoning approvals and permits that OCEANSIDE has received have not been challenged and overturned by or that such challenges are not pending resolution before a court or a comparable federal, state or county administrative body. For purposes of this paragraph, "commenced construction" shall mean that OCEANSIDE has been awarded final subdivision approval and has received all necessary construction permits for the Project." (emphasis added)

³ Section 20 of the Development Agreement states, "In the event that a question arises regarding OCEANSIDE's and the COUNTY'S responsibilities or their intent, the parties shall look toward this Agreement to clarify such issues."

⁴ Section 13.d of the Development Agreement states, "In any event from the time construction commences, the entire Bypass Highway shall be completed within five (5) years provided that those certain circumstances as articulated in Paragraph (39) do not exist."

and 96-8, as well as subdivision approvals that the County had issued to Oceanside under the ordinances.

12. Although Oceanside had no obligation to do so (in light of Recital "L"), Oceanside started to construct the Hokuli'a project's public-benefit improvements, such as the Shoreline Park and the Bypass.

13. As to the Bypass, Oceanside started work on the Bypass in February 2002.⁵

14. In September 2003, approximately twenty (20) months after Oceanside started constructing the Bypass, the circuit court enjoined construction of the Bypass as part of its ruling in the Kelly case and Oceanside ceased construction in accordance with the circuit court's injunction.

Challenges Brought by the Coupe Family

15. In the meantime, in 2000, the County had initiated an action to condemn a portion of the Coupe family's land for the Bypass right-of-way and to obtain the immediate possession of the Coupe family's land.⁶

16. In 2005, the County initiated a second action in which the County again asked the circuit court to approve the condemnation of the Coupe family's land and to obtain the immediate possession of the Coupe family's land.

17. In response to both actions, the Coupe family filed a third-party complaint against Oceanside that challenged Oceanside's permits and approvals, including Oceanside's right to build the Bypass on, over and through the Coupe family's land.

Burial 21833

18. In addition to the foregoing events, in August 2000, Oceanside made an inadvertent discovery of human remains (Burial 21833) in the Bypass right-of-way corridor and, pursuant to state law, ceased construction.

Kelly Settlement Agreement

19. Effective March 2006, the parties in the Kelly case entered into a settlement agreement⁷ under which Oceanside restated its agreement to

⁵ Oceanside and its contractor held ground breaking ceremonies in December 2001. In February 2002, Oceanside started actual grading and fencing.

⁶ In 2000, the circuit court gave the County immediate possession of the Coupe family's land, but later withdrew its order of possession in 2002 due to the Coupe family's objections.

“complete the Bypass Highway promptly,” but “subject to “obtaining all necessary right-of-way ... approvals” and “by a date to be established pursuant to Section 3.8” of the settlement agreement.⁸

20. The circuit court subsequently approved the Kelly settlement agreement and dismissed the challenges that the Kelly plaintiffs had brought against Oceanside’s permits and approvals and also withdrew the court’s injunction against Oceanside’s construction activities.

Settlement Condition -- SHPD “Approval” (Burial 21833)

21. One of the “approvals” referred to in the Kelly settlement agreement and that Oceanside needed before it could restart construction was the State Historic Preservation Division’s approval of the proposed disposition of Burial 21833.

22. According to the Development Agreement’s force majeure clause (Section 39), the work-stoppage caused by the inadvertent discovery of Burial 21833 constituted grounds for Oceanside to suspend construction.⁹

23. In January 2007, about 10 months after the effective date of the Kelly settlement agreement, the State Historic Preservation Division approved Oceanside’s proposal to relocate Burial 21833,¹⁰ but Oceanside still could not

⁷ The Coupe family members were not parties to the Kelly case or settlement agreement.

⁸ Section 3 of the Kelly settlement agreement states, “As a result of the delay created by the Litigation, the County Administration shall grant to Oceanside, as permitted by the Zoning code and other applicable law, such reasonable extensions of time as may be required to complete and satisfy Oceanside’s obligations under the Hokuli’a Project Approvals, including but not limited to the construction of the Bypass Highway, and to satisfy pertinent conditions under the Hokulia Project Approvals.”

⁹ “In the event either party shall be delayed or hindered in or prevented from the performance of any duties, obligations or conditions provided for and required under this Agreement by reason of strikes or other disturbances, lockouts, labor troubles, riots, insurrection, war or civil disturbance, fire or earthquake, tidal wave, acts of God, the elements, government legislation, regulation or controls, or economic controls, making it impossible to complete any duties, obligations, or conditions provided for and required under this Agreement, then performance of any such duty, obligation or condition shall be excused for the period of the delay and the period for the performance of any such duty, obligation, or condition shall be extended for a period equivalent to the period of such delay. ...” (emphasis added)

¹⁰ Oceanside completed the relocation in July 2007.

restart construction because Oceanside needed another “approval” that was necessary to restart construction.

Settlement Condition -- Court “Approval” to Take Coupe Land

24. The other “approval” referred to in the Kelly settlement agreement that Oceanside needed before it could restart construction was the court’s final approval of the County’s two actions to condemn the Coupe family’s land for the Bypass right-of-way as well as the circuit court’s final disposition of the Coupe family’s challenges against Oceanside’s permits and approvals and Oceanside’s right to construct the Bypass on, over and through the Coupe family’s land.¹¹

25. Even after the Kelly case had been settled, the Coupe family continued to challenge Oceanside’s permits and approvals.

26. Without the circuit court’s approval of the County’s request to condemn the Coupe family’s land,¹² Oceanside could not enter on the Coupe family’s land and restart construction of the remaining (southerly) portion of the Bypass on, over and through the Coupe family’s land, even though work-stoppage arising out of Burial 21833 had been resolved.

27. In mid-2007, the circuit court held a bench trial on County’s two actions to condemn the Coupe family’s land and on the Coupe family’s challenges against Oceanside’s permits and approvals.

28. In October 2007, the circuit court approved the County’s request to condemn the Coupe family’s land, dismissed the Coupe family’s challenges against Oceanside and entered a judgment to that effect.

29. However, the Coupe family filed an appeal from the circuit court’s judgment.¹³

¹¹ When the parties in the Kelly case signed the settlement agreement in March 2006, the County’s two condemnation actions for the Coupe family’s land were still pending trial.

¹² Although the circuit court had initially granted the County immediate possession of the Coupe family land in 2000, the circuit court later withdrew its order of possession in 2002.

¹³ The Coupe family did not designate their points of error on appeal until they filed their Opening Brief in 2008. In their Opening Brief, the Coupe family continued to challenge Oceanside’s right to build the Bypass on, over and through the Coupe family’s land.

30. Nothing in the Development Agreement states that Oceanside is required to restart construction on the date that the circuit court rendered its condemnation judgment, the Coupe family's appeal notwithstanding.

31. Recital "L" also states that Oceanside is not required to start or to restart construction if challenges are brought against permits and approvals that are contemplated by Ordinances 96-7 and 96-8 and if those challenges remain "pending resolution before a court."

Indemnity

32. Nonetheless, County officials asked if Oceanside would be willing to restart construction if the County agreed to indemnify Oceanside against any claims that the Coupe family might bring against Oceanside if Oceanside entered on and constructed the Bypass on, over and through the Coupe family's land before the appellate courts decide the Coupe family's appeal.

33. However, the state's general law governing counties, the Hawaii County Charter and the Hawaii County Code do not authorize the County to indemnify Oceanside against such claims.

34. Nor does the Development Agreement authorize the County to indemnify Oceanside against such claims.

35. Although the County's annual operating budget has an allocation for claims and judgments, the allocation is limited in amount, must be renewed during each budget period and cannot be construed to be an indemnity fund.

36. In light of the risks presented by the Coupe family's appeal, Oceanside was not willing to restart construction.

Success on Appeal

37. County officials also expressed confidence in the County's likelihood of success in the Coupe family's appeal, asserting that the appellate courts will dismiss the Coupe family's appeal and, therefore, that Oceanside should restart construction immediately.

38. In light of the risks presented by the Coupe family's appeal, Oceanside was not willing to restart construction.

Future "Re-Condemnation" Action

39. County officials also noted that even if the Coupe family were to prevail on appeal, the County will initiate another condemnation action to acquire the Coupe family's land and that such future action adequately protects Oceanside against claims or risks if Oceanside restarts construction immediately.

40. In light of the risks presented by the Coupe family's appeal, Oceanside was not willing to restart construction.

Similar Case (Common Law Treatment)

41. The case of Laas v. Montana State Highway Commission, 483 P.2d 699 (Mont. 1971) is helpful. There, the owner of an easement over a parcel on which the contractor was to build a road (and which easement the state was supposed to condemn) interfered with the contractor's work. Since the state did not complete the condemnation action in a timely manner, the contractor stopped work.

42. The court in the Laas case held that the contractor "had a right to assume ... that the right-of-way had been obtained, or would be obtained without detriment to him." (emphasis added)

43. Thus, the common law governing contracts suspends Oceanside's obligation to restart construction until the County completes its obligation to acquire the Coupe family's land, including the final disposition of the Coupe family's appeal. Laas v. Montana State Highway Commission, supra.

Recital "L"

44. Recital "L" also suspends Oceanside's obligation to restart construction if the Coupe family's challenge remains pending before the appellate courts.

No Time Extension Needed Now

44. The Development Agreement's time extension clause (Section 26.a) authorizes the Planning Director to extend the completion date for the Bypass (the "clock") "upon written request of Oceanside."

45. However, there is sufficient time on the "clock" at this time in which Oceanside can complete the remaining (southerly) portion of the Bypass Highway.

46. Nonetheless, Oceanside reserves the right to obtain a time extension in the future if Oceanside needs a time extension at that time.

Subdivision (Bond) Agreement Deadline

47. In Oceanside's agreement dated September 16, 1999 and entitled "Agreement for Regional Traffic Improvements"), Oceanside's obligation to construct those improvements is conditioned upon Oceanside "receiving all necessary development approvals."¹⁴

¹⁴ Section 1 states, "OCEANSIDE shall construct to completion the Mamalahoa Highway Bypass and other required regional traffic improvements, scopes of work, performance schedules, and related bond amounts which are contained in Exhibit A

48. Section 6 of the Agreement for Regional Traffic Improvements also states that Oceanside may terminate the Agreement “if all necessary development approvals are not issued by appropriate governmental agencies for the construction of the Mamalahoa Highway Bypass and other regional traffic improvements which are described herein.”

49. The completion deadline (or the “clock”) for the Bypass is the subject of three related agreements – (a) the September 16, 1999 Agreement for Regional Traffic Improvements, (b) the Development Agreement¹⁵ and (c) the Kelly settlement agreement.

50. Since the provisions in each of the three agreements must be construed in a consistent manner, the completion deadline in the September 16, 1999 Agreement for Regional Traffic Improvements must be construed in the same manner as the completion deadline in the Development Agreement and the Kelly settlement agreement is construed.

Conclusions

A. Recital “L” in the Development Agreement operates to suspend Oceanside’s obligation to construct the Bypass as follows:

- Due to the challenges brought by the Kelly plaintiffs against Oceanside’s permits and approvals, from 2000 (the date of the complaint) to the effective date of the settlement agreement in March 2006;
- Due to the challenges brought by the Coupe family against Oceanside’s permits and approvals, from 2000 to present.

B. The common law governing contracts operates to suspend Oceanside’s obligation to construct the Bypass as follows:

- Due to the challenges brought by the Coupe family against Oceanside’s permits and approvals, from 2000 to present.

attached hereto” The completion date for the scope of work described in Exhibit A for the Mamalahoa Highway Bypass, Phase I and Phase II, is “January 2005.” Section 2 nevertheless conditions Oceanside’s obligation upon “receiving all necessary development approvals” and the “absence of a force majeure” event.

¹⁵ The recitals in the September 16, 1999 Agreement for Regional Traffic Improvements acknowledges that Oceanside’s obligation to construct the Mamalahoa Highway Bypass is based upon “Ordinance Nos. 96-7 [and] 96-8” and under the “Development Agreement which was executed by the parties effective April 20, 1998.”

C. The Development Agreement's force majeure clause operates to suspend Oceanside's obligation to construct the Bypass as follows:

- Due to the inadvertent discovery of Burial 21833, from August 2000 (the date of discovery) to July 2007 (the date of final disposition).
- However, this period of suspension is subsumed by the suspension under Recital "L" and the common law governing contracts arising out of the Kelly and Coupe challenges against Oceanside's permits and approvals.

D. Since Oceanside had the opportunity to actually construct portions of the Bypass between February 2002 and September 2003 (a period of 20 months),¹⁶ the time consumed should be applied against the "clock," leaving forty (40) months on the "clock."

<u>Event</u>	<u>Period of Suspension</u>	<u>Time Left on the "Clock"</u>
<u>Kelly</u> challenge	2000 - 2006	5 years (60 months)
<u>Coupe</u> challenge	2000 - present	5 years (60 months)
Burial 21833	2000 - 2007	Subsumed by challenges
	<u>Time Applied</u>	
Actual construction	20 months Feb. 2002 - Sept.2003	40 months

E. The completion deadline under the September 16, 1999 Agreement for Regional Traffic Improvements also remains suspended, with forty (40) months left on the "clock"

F. Forty (40) months is a sufficient time in which Oceanside can complete the Bypass, once the Coupe family's appeal is finally determined by the appellate courts.

End of Exhibit "1"

¹⁶ Section 13.d of the Development Agreement states the "clock" starts "from the time construction commences" pursuant to all "necessary construction permits for the Project."